United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

To be argued by
FREDERICK J. LUDWIG

75-2105

United States Court of Appeals

For the Second Circuit

Docket No. T 4708

In the Matter of the Application
of
DEIDRE SMITH,
Petitioner-Appellant,
for a Writ of Habeas Corpus
- against -
JANICE P. WARNE, Superintentendant,
Bedford Hills Correctional Facility of the State of New York,
Respondent-Appellee.

BRIEF FOR APPELLANT

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ORIGINAL

STATE OF NEW YORK, COUNTY OF NEW YORK ss.: AFFIRMATION OF SERVICE BY MAIL

FREDERICK J. LUDWIG

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Suite 4419, 60 E. 42d St., N.Y., N.Y. 10017

That on the 13th day of October 1975 deponent served the within BRIEF FOR APPELLANT upon THE HON. LOUIS J. LEFKOWITZ, Attorney General, State of New York, attorney(s) for the Respondent-Appellee in this action, at Two World Trade Center, New York, N.Y. 10047, the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Affirmed under penalties of perjury. Oct. 13 19 75.

FREDERICK J. LUDWIG

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BRIEF FOR APPELLANT

This is an appeal from an order entered on April 4, 1975 dismissing without hearing an application for leave for issuance of a Writ of Habeas Corpus by the Honorable Harold Russell Tyler Jr., then a Judge of the United States District Court for the Southern District of New York (113*). A Certificate of Probable Cause to appeal was granted by the Honorable Lawrence W. Pierce on June 25, 1975, United States District Judge for the same Court (149).

*Numerical references contained in parentheses ( ) throughout are to page numbers of the Joint Appendix on Appeal in this case.

QUESTIONS PRESENTED ON APPEAL

The Federal questions arising in this case under the Fourth Amendment are these:

[i] Whether or not searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable, when such searches involve premises and not persons, and when they are not within the few and specifically established and well delineated exceptions that are jealously and carefully drawn and that involve exigencies of a situation making that course imperative.

[ii] Whether or not there was probable cause for seizure of the person of petitioner.

[iii] Whether or not exploitation of that seizure of her person and the subsequent prolonged detention both in another apartment and the one in which the tangible objects were seized did not result in obtaining the very evidence on the basis of which petitioner was convicted.

[iv] Whether or not the stopping of petitioner in the public elevator and hallway, and her removal and detention in another apartment, justified the search of the apartment in which she lived.

[v] Whether or not the exploratory search of apartment 15 A was justified in closets and drawers in rooms other than the one in which petitioner was being detained.

[vi] Whether or not the search of apartment 15 A after removal of petitioner to the police station house was justified.

[vii] Whether or not any alleged consent to the search

by petitioner was submission to overwhelming authority, and not an understanding and intelligent waiver of a Constitutional right that was freely and voluntarily given.

[viii] Whether or not the factfinding procedure employed by the State court in making its determination of factual issues affecting admissibility of evidence alleged to have been unlawfully seized was adequate to afford a full and fair hearing, whether or not the facts were adequately developed before determination of those issues, whether or not that determination was fairly supported by the record, and whether or not petitioner was otherwise denied due process of law in the making of that determination.

The Federal question arising under the Fifth and Sixth Amendments is this:

[ix] Whether or not the restrictions imposed upon petitioner's freedom of action by the police during her detention and interrogation in both apartment 15 B and 15 A did require giving the prescribed Miranda warnings, especially following announcement of a criminal charge against petitioner for unlawful possession of a marijuana cigaret.

The Federal question arising under the due process clause, considered in a procedural sense, of the Fourteenth Amendment is this:

[x] Whether or not at petitioner's trial the double hearsay testimony of the prosecutor in summation - who had also been in charge of the investigation of the case - that a lie detector test to which petitioner was subjected did not involve questions concerning narcotics with which she was being charged.

The Federal question arising under the due process clause, considered in a procedural sense, of the Fifth Amendment is this:

> [xi] Whether or not the judgment of the District Court below dismissing the application for the Writ without any hearing whatsoever denied appellant a hearing before an impartial tribunal under both the circumstances of this case presented in the petition and the circumstances surrounding the disposition.

The issue of fact in this case was which of the two occupants of apartment 15 A did "possess", i.e., did "have physical possession or otherwise [to] exercise dominion or control over tangible property" (N.Y. Penal Law § 10.00(8)), consisting of dangerous drugs seized after exploratory search of a closet in a den in that apartment and introduced in evidence over petitioner's objections at her trial:

> [A] Deceased Bobby Madden, 39 years old and married, with a criminal record involving narcotics, who was assumed to have physical possession or otherwise to exercise dominion or control over guns and other contraband seized in the closet of his den that contained also shoes and items of raiment that were exclusively male; or
>
> [B] Petitioner, his 20 year old pregnant girlfriend, with no record of conflict with the law, and whose items of clothing were found by the police in their exploratory search in another closet in a different room - the bedroom - of that apartment.

STATEMENT OF THE CASE

Introduction

On February 26, 1973, petitioner was sentenced in the County Court, County of Westchester, State of New York, to a maximum term of life imprisonment and a minimum period of fifteen years' imprisonment on each of two counts of an indictment, after trial and verdict of guilty on each count by a jury. the sentences to be served concurrently.[1] Each of the two counts in the indictment[2] charged in identical words the crime of possession of a dangerous drug in the first degree, the first count alleging an aggregage weight of sixteen ounces or more containing heroin, and the second count, in identical words, cocaine. Neither the indictment nor the People's printed brief on appeal nor any other paper or record in this proceeding contains any reference whatsoever to any statutory provision that

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1. Verified petition [hereafter, Pet.] par. THIRD (5).

2. Pet. par. TWENTY-FIFTH, APPENDIX G (21, 94).

petitioner is alleged to have violated.[3] Upon appeal to a State intermediate appellate court, the judgment was affirmed, without opinion.[4] One Judge of the State's highest court denied leave to appeal.[5]

The Facts

The case against petitioner for possession of dangerous

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3. The highest possession crime of the former Penal Law of New York consisted of possession of any quantity of narcotics "with intent to sell" the same; and a presumption of intent to sell was predicated upon possession of certain specified quantities [former Penal Law § 1751(2)]. The new Penal Law, effective September 1, 1967, continued these specified quantities for the first degree possession crime but abandoned the presumption. New York Penal Law, McKinney's Consol.Laws, c.40:

> "§ 220.20 Criminal possession of a dangerous drug in the first degree
>
> "A person is guilty of criminal possession of a dangerous drug in the first degree when he knowingly and unlawfully possesses a narcotic drug consisting of (a) one hundred or more cigarettes containing cannabis; or (b) one or more preparations, compounds, mixtures or substances of an aggregate weight of (i) one or more ounces, containing any of the respective alkaloids or salts of heroin, morphine or cocaine, or (ii) one or more ounces, containing any cannabis, or (iii) two or more ounces, containing raw or prepared opium, or (iv) two or more ounces, containing one or more than one of any of the other narcotic drugs.
>
> "Criminal possession of a dangerous drug in the first degree is a class C felony."

The maximum permissible indeterminate term of imprisonment for a class C felony is fifteen years. Penal Law § 70.00(2)(b). Section 220.20 was repealed, effective September 1, 1973 [Laws of New York, 1973, c. 276, § 18.]. The top possession crime , criminal possession of a controlled substance in the first degree, requires "two ounces or more containing a narcotic drug", is classified as a A-I felony and became effective September 1, 1973. Penal Law § 220.21.

4. Pet., APPENDIX B (32).

5. Pet., APPENDIX C (35).

drugs arose out of the murder of one Bobby Madden in the public corridor outside his apartment, No. 15 A, 1841 Central Park Avenue, Yonkers, New York, at about 1:30 A.M., January 24, 1971 and the response of the police to the scene. The homicide remains unsolved.[6]

There were two eyewitnesses to the murder: Hannah Futuro who was leaving apartment 15 M at the time in the company of Sheila Altman. Both saw and recognized Bobby Madden as the door to 15 A opened and Madden left. Madden was in the process of closing the door when another male appeared in the hallway, struck Madden and shot him as he continued down the hallway until he dropped.[7]

The events immediately preceding Madden's fatal exit from 15 A into the public hallway were recounted by the only other person in that apartment, petitioner Deidre Smith. She was twenty years old and pregnant at the time. She had been lying in bed with Madden since about 8:30 P.M. watching television. At eleven o'clock, Madden announced that he was going downtown but was not yet ready to leave. He remained in bed until about 1:30 A.M. when he arose, dressed, stated that he would return in an hour and went out the doorway of 15 A into the public hallway. After a few minutes, petitioner arose to get something to eat in the kitchen, heard a commotion in the hallway, looked through the peephole, put on clothing after hearing a

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6. Id., par. FOURTH (5).

7. Id., par. FIFTH (6).

black man had been shot (Madden was the only black tenant in the sixteen apartments on the fifteenth floor), and left to discover that Bobby Madden was that man.[8] Petitioner returned to apartment 15 A, put on her coat, took a locked box in which Madden kept his money and papers from a closet in his den, left the apartment and entered the elevator from which the first two police officers responding to the homicide had just left.[9]

The public hallway on the fifteenth floor confronting the police consisted of an area of 120 feet in length, running in a north-south direction, and seven feet in width. Sixteen apartments, three elevator banks in the center, and one stairwell opened on the public area. Apartment 15 A was immediately to the right of one of the elevators on the east side of the hallway. The body of Bobby Madden lay face down, thirty to forty feet from an elevator. A handgun, believed to be an automatic, lay on the left side of his body, not near the arm or hand of Madden. Five empty, spent shells were distributed all the way down the hallway.[10]

The crucial facts apparent to the police at the scene were:

[i] Madden was the victim of a criminal homicide;

[ii] The criminal agency were gunshot wounds;

[iii] An automatic gun and five of its spent shells lay in open view in the public hallway; and

[iv] The homicide was in fact witnessed by two women who were able to identify the perpetrator as a male.[11]

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8. Id., par. NINTH. (9).
9. Id., par. TENTH. (9).
10. Id., par. SIXTH. (7).
11. Id., par. SEVENTH. (7).

What happened during the next three hours - from shortly after 1:30 when petitioner entered the elevator until about 4:30 when she was taken to the police station - on Sunday morning, January 24, 1971, on the fifteenth floor of 1841 Central Park Avenue, in the elevator stopped at that floor, in the public hallway on the way to apartment 15 B, in apartment 15 B, in the public hallway on the way from 15 B to 15 A, and in 15 A, may be described from the testimony of the police without reference to any evidence given by the petitioner. Officer Drexel, one of the first two uniformed policemen - the first who appeared on the scene - literally grabbed petitioner at the elevator and took her physically. She struggled with him because he was grabbing her.[12]

Officer Drexel stood guard over petitioner from the time of his physical removal of her from the elevator, through the public hallway on the fifteenth floor to apartment 15 B, inside apartment 15 B during her detention in that apartment, during her removal through the public hallway from 15 B to 15 A, and during her detention in 15 A for the first two or three minutes.[13]

During the detention of petitioner in 15 B, Officer Drexel closed the door after he put her in there and interrogated her concerning the homicide. Petitioner answered that she did not see anything or anybody come to the door of 15 A.[14] During his interrogation of petitioner, Officer Drexel determined that she lived in apartment 15 A. Other police officers

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12. Id., par. TENTH (9).
13. Id., par. ELEVENTH (10).
14. Ibid.

from the Yonkers Police Department arrived: Detective Joel Parisi, a second grade, i.e., with additional compensation above his civil service rank of patrolman, and assigned to the narcotics squad, who was demoted to the patrol force in uniform with loss of additional compensation following this investigation; Lieutenant Frank Sardo, subsequently promoted to deputy chief of police of the department; and Sergeant Michael D'Ambrosio who accompanied the Lieutenant. After Drexel informed Sardo and D'Ambrosio that the petitioner lived in 15 A, they announced, "[W]e will take her over to 15 A."[15] Drexel swore at the trial, "It was one of my superiors that took her," one of the uniformed superiors who did it.[16]

The manner in which the police witnesses obtained entry into 15 A was explained in their testimony. According to Drexel, "I just followed, just followed, she went into her apartment on her own," and "it's possible" that there was a uniformed officer in front of her as she left 15 B.[17] D'Ambrosio, who entered 15 A just behind his superior, Sardo, was let in by Sergeant Connally of the Yonkers Police Department emergency squad. Sardo observed Sergeant Connally standing in the hallway in front of apartment 15 A but could not recall who admitted him. Parisi followed petitioner "maybe ten feet behind her" into 15 A, recalled Sergeant Connally making a phone call from 15 B, and had no conversation with petitioner in 15 B about his entering 15 A. Parisi also invited a later arriving detective, Stypulkowski, into 15 A, but Stypulkowski insists that "The door was wide

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15. Id., par. TWELFTH (11).
16. Id., APPENDIX D, at page 364 (69).
17. Ibid.

open and I looked in and I saw Deidre Smith sitting on the couch. * * * Detective Parisi was there, but I didn't see him until I came into the apartment."[18]

Officer Drexel remained in 15 A briefly, "approximately maybe 2 or 3 minutes". During this brief period, Drexel obsered eight additional police officers enter 15 A, making the total police complement an even dozen. During this brief period, petitioner was sitting down on a couch in the living room in apartment 15 A that comprised six rooms (two baths and a den). During this two to three minute period, there was a lot of activity around petitioner: the "maybe eight" additional officers who had entered 15 A began searching the apartment. "[T]hey were in the apartment opening drawers and stuff like that, going in the closets like looking for the murder weapon. * * * " During the fleeting few minutes during which petitioner sat on a couch in the living room guarded by Officer Drexel, "They opened a few closets and were looking in the bedroom you know. I didn't observe, I know they were going through the rooms though." "Right", testified Officer Drexel, they were looking all over the place.[19]

Detective Parisi has never claimed any consent for him to search 15 A.[20] Yet he swore, "I searched the Den area * * *

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18. Id., par. FOURTEENTH (12).

19. Id., par. SIXTEENTH (13-14).

20. Parisi's claim is only that - unlike Sardo, D'Ambrosio and Stypulkowski - he was invited by petitioner to enter apartment 15 A: "I would like to ask you a few questions and she said. It would be alright if we went to my apartment and so I said fine." Transcript, Suppression Hearing at p. 192. "And she said all right and she said do we have to do it here, she said can we go to my apartment or something to that effect." Transcript, Trial at p. 476.

a small adjoining room which would appear to be like a den. * * * when I searched the den area, the closet of the den area is where I found this. * * * It was in a brown paper bag. * * * I have it marked here as three thousand three hundred and ninety bags of heroin." This evidence was held non-suppressible and admitted at trial against petitioner.[21] The den contained in an adjoining room was at no time visited by petitioner during the two and one-half hour period of her detention in 15 A by a minimum of a dozen police officers. The search of the closet in the den was exploratory and not cursory: the closet had a door or doors that were closed and were opened by Parisi.[22] Moreover, this closet contained men's shoes, men's shirts and men's jackets;[23] a similar exploratory search of another closet in the bedroom by Parisi turned up no contraband and was found by him to contain women's clothing.[24]

Parisi took notes of questions and information of his interrogation of petitioner seated on a couch in the living room but admitted, "I threw the notes away."[25] Throughout the entire period on January 24, 1971 on the fifteenth floor of 1841 Central Park Avenue, beginning at about 1:45 A.M. when petitioner was seized at the elevator by Drexel, removed to apartment 15 B and interrogated there, taken to apartment 15 A and subjected to further interrogation in the living room,

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21. Pet., par. SEVENTEENTH (14).
22. Transcript, Trial at page 537-38.
23. Id. at page 541.
24. Id. at page 579.
25. Pet., par. EIGHTEENTH (15).

until immediately before her removal to the police station at about 4:00 A.M., no warnings were given petitioner about her constitutional right to remain silent or contact an attorney, and no claim is made by the police that any were given.[26] As to the significance of restrictions imposed by the police on petitioner's freedom of action in 15 A during her detention and interrogation there, her use of the bathroom, the bedroom to change her clothes and the telephone in the kitchen are illustrative of the surveillance by the police who numbered twelve in the apartment at the inception. "[S] he asked to use the bathroom, which she was permitted to do. * * * [A]gain she wanted to use the bathroom. She was permitted to use the bathroom again * * *[S]he went into the bathroom and she was instructed not to lock the door * * * I knocked on the door and insisted that she come out." "She asked to use the bathroom again. * * * I asked her not to lock the door at this point and I think that she left it slightly ajar. Just a trifle open and I asked the sergeant to stand there in front of it * * *". In the bedroom, "She was going through the changing routine again and she asked me to at least turn my back. I turned my back, but I could see her through the window, it was dark and you could see the reflection. She asked her girlfriend to hold the coat in front of her while she changed." "[S]he asked the lieutenant if she would be permitted to make a telephone call. Which she was permitted to do in the kitchen." "I accompanied her to the kitchen and she called up Thelma Grant. I was there, yes" and listened to the conversation.[27]

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26. Id., par. NINETEENTH (15-16).
27. Id., par. TWENTY-FIRST (17-19).

The seizure and detention of petitioner was accomplished without any prior judicial approval. Not until eleven days later on February 1, 1971 was application made to the County Court, County of Westchester, to hold petitioner as a material witness and to fix bail in the sum of $1,000,000.00. The Court set bail at $100,000.00 and remanded petitioner.[28]

Fifty-one days after her seizure and detention, petitioner was first accused by indictment handed up on March 16, 1971 in two counts, otherwise identically worded, charging criminal possession of a dangerous drug in the first degree by knowing and unlawful possession of substances of an aggregate weight of sixteen ounces or more containing, in the first count, heroin, and in the second count, cocaine.[29]

A hearing on petitioner's motion to suppress the tangible evidence seized by the police on January 24, 1971 as well as statements taken by them from her was held before County Judge John C. Couzens. The Judge candidly placed on the record, "that I have been informed that several police officers from the City of Yonkers will be called as witnesses in this hearing. That having spent upward of ten years in the City Court of Yonkers, I am personally acquainted with the police officers and am socially acquainted with at least one of them." A critical issue of fact in the hearing on suppression of the tangible evidence was which occupant of apartment 15 A -the deceased Madden or petitioner, his twenty year old pregnant girlfriend - had dominion and control over any narcotic drugs seized there.

28. Id., par. TWENTY-FOURTH (20-21).

29. Id., APPENDIX G (94).

Sardo had testified that Madden "had a previous history of involvement in narcotics," and that there had been "some mention of it later that night by someone." But on cross-examination of the detective from the narcotics squad present on the scene, Parisi, objection was twice sustained to inquiry whether Madden had a record for dealing in narcotics. By decision dated December 29, 1972, with opinion otherwise unreported, petitioner's motion to suppress was in all respects denied. "This Court is mindful that while it sits back discussing the legal niceties of those events it must never loose [sic] sight of the fact that the events of that evening were not calm, but rather, chaotic. * * * Her consent was freely and voluntarily given. * * * All statments made by her were not made while she was in any sense of the word 'in custody'. She had freedom of movement and contact with friends and neighbors."[30]

Throughout the trial and upon summation, the prosecutor -who had participated in the investigation- repeatedly made himself an unsworn witness over objections by defense counsel. For example, this testimony - both unsworn as well as hearsay - occurred in summation with respect to a lie detector test conducted on petitioner while in custody: "Deidre was not asked any questions to myknowledge I wasn't there, but I talked to him the man the state trooper who did it and he said he did not ask any questions about drugs and that is all I will say to your Honor * * *."[31]

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30. Id., par. THIRTY-FIRST, APPPENDIX I (26-27, 104, 106).

31. Id., par. THIRTY-SECOND (27).

EDITOR'S NOTE

Pages 16 were missing at time of filming. If, and when obtained, a corrected fiche will be forwarded to you.

ARGUMENT

POINT I

The warrantless search by the police of apartment 15 A was per se unreasonable, in the absence of the few and specifically established and well delineated exceptions that are jealously and carefully drawn and that involve exigencies of a situation making that course imperative.

The prohibition of warrantless searches of premises by the police has been succinctly stated by the Supreme Court, per Mr. Justice Stewart, in Coolidge v. New Hampshire, 1971, 403 U.S. 443, 454-55 [opinion of the Court]:

> "Thus the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions.' [citing Katz v. United States, 1967, 389 U.S. 347,357]. The exceptions are 'jealously and carefully drawn,' [citing Jones v. United States,1958, 357 U.S. 493, 499] and there must be a showing by those who seek exemption * * * that the exigencies of the situation made that course imperative' [citing McDonald v. United States,1948, 335 U.S. 451, 456]. '[T]he burden is on those seeking the exemption to show the need for it.' [citing United States v. Jeffers,1951, 342 U.S. 48,51]. "

The "most basic constitutional rule" that warrantless searches "are per se unreasonable," has been consistently followed since formulation of the exclusionary rule for the Federal Courts in 1914 and for the states in 1961. In the Coolidge case itself, probable cause was so overwhelming

that even after reversal of his conviction for murder by the Supreme Court, he pleaded guilty to manslaughter rather than undergo a second trial on the original charge without introduction of the excluded evidence. Coolidge was arrested in his house, after which the police impounded his two automobiles parked in the driveway outside his house, and towed them to the police station. One of the cars was vacuumed two days later, and twice again on subsequent occasions, and sweepings from the car were introduced in evidence against the defendant. Search warrants procured from the attorney general of the State had been found invalid because the issuer was not a neutral and detached magistrate in this case. The Court held the search warrantless and as such not justifiable as incidental to Coolidge's lawful arrest made inside his house.

Last Term, the Court refused to review the rejection by a Court of Appeals of the so-called doctrine of "inevitability," i.e., that a warrantless search may be upheld if in fact probable cause existed at the time of the search and a valid warrant could have been obtained, and indeed was in the process of being obtained, at the time the search was being made. United States v. Griffin, 1974, ___ U.S. ___, 16 Cr L 4108. Earlier, in the same decade and through the same Justice, the Court insisted upon the identical doctrine that warrantless searches "are per se unreasonable", notwithstanding the procurement of arrest warrants and ample probable cause. Vale v. Louisiana, 1970, 399 U.S. 30 [discussed in POINT IV, post]. And in the Sixties, the same Justice under the same circumstances of

procurement of valid arrest warrant rejected a warrantless search. Chimel v. California, 1969, 395 U.S. 752 [discussed in POINT V, post].

In the Fifties, in Jones v. United States, 1958,357 U.S.493, Federal agents had actually obtained a search warrant to search a home upon probable cause that contraband liquor was being produced there. The warrant authorized only a daytime search. Instead of executing the warrant during the daytime, the agents waited until evening when they entered and searched the home. The Court held that the search violated the Fourth Amendment, notwithstanding the existence of both probable cause and the procurement of a search warrant, albeit one that did not authorize nighttime search. Said the Court, per Justice Harlan [id. at 498]:

> "Were federal officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home, the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified."

In the Forties, on three occasions the Court reiterated the "per se unreasonable" rule for warrantless searches. Each decision was announced in 1948. In McDonald v. United States, 333 U.S. 451, local police officers had heard the telltale sound of an adding machine outside a house in the nation's capital, indicating a numbers operation. Without pausing to obtain a warrant, the officers entered the house through a landlady's window, looked over a transom on an up-

per floor and saw gambling paraphenalia. They shouted to the defendant occupant to open the door to his room and he did so. Said the Court, per Justice Douglas [id. at 455]:

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was not done to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home."

In Trupiano v. United States, 334 U.S. 699, agents raided the site of an unlawful distillery, saw one of several conspirators operating the still, arrested him and contemporaneously"seized the illicit distillery". Since one of the agents had been on the scene undercover for several weeks before the raid, the Court found that there had been more than enough time to procure a search warrant and held the search unlawful and its fruits subject to suppression despite the lawfulness of the arrest (which in fact took place pursuant to a warrant of arrest). Trupiano, in this respect, was explicitly overruled in less than two years [Rabinowitz v. United States, 1950, 339 U.S. 56 at 66, discussed this POINT,

post, page 23, but Lazarus-like was resurrected twenty years later with this language of the Court per Justice Murphy set forth [Chimel v. California, supra, 395 U.S. 752]:

> "It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable. * * *
>
> "This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be place upon such activities. * * * In their understandable zeal to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed. To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement." [Trupiano v. United States, supra, 334 U.S. at 705].

In Johnson v. United States, 333 U.S. 10, the first of the trilogy in 1948, the unmistakeable odor of opium was smelled by the police outside a hotel room. The police knocked on the door, identified themselves and told the occupant that they wanted to talk to her. She stepped back acquiescently and admitted the officers. Subjectively - in this case according to the olfactory sense of the police, or under any objective or external standard, ample probable cause and sufficient particularization of its target existed for a search before it was made. Despite "the inconvenience to the officers and some slight delay necessary to

prepare papers and present the evidence to a magistrate " [id. at 14-15], the Court found the warrantless search in violation of the Fourth Amendment and its fruit suppressible. In oft-quoted language, the Court per Justice Jackson explained the need for neutral and detached determination before the police undertake a search [id. at 13-14]:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

Finally, in the Thirties in two cases involving enforcement of the Prohibition Act, warrantless searches of desks, a cabinet and a safe in two separate offices, and seizure of incriminating papers were held unlawful. This was so even though prior judicial approval had been obtained in the form of valid arrest warrants and these warrants were validly executed contemporaneously at the place of arrest with the warrantless searches. Both opinions of the Court were by Justice Butler. United States v. Lefkowitz, 1933, 285 U.S. 452; Go-Bart Importing Co. v. United States, 1932, 282 U.S. 344.

Since adoption of the exclusionary rule more than three score years ago, Weeks v. United States, 1914, 232 U.S. 383, in only three cases has the Supreme Court ever departed from "the most basic constitutional rule," the "cardinal rule,"

that warrantless searches "are per se unreasonable under the Fourth Amendment," and that "law enforcement agents must secure and use search warrants wherever reasonably practicable." In all three cases, valid arrests had been made and the searches conducted contemporaneously and at the scene of the arrests. In all three cases, prior judicial approval had been obtained in the form of valid warrants - in one, a search warrant, and in the other two, arrest warrants. All three cases have since been overruled by the Supreme Court.

In the first case, Marron v. United States, 1927, 275 U.S. 192, a valid search warrant had actually been obtained in advance of the search, but it was limited in its particularization under the Prohibition Act to seizure of liquor and certain articles used in its manufacture. However, the place to be searched specified in the warrant turned out to be a "speakeasy" and not a "still". When the agents saw "that the place was used for retailing and drinking intoxicating liquors," they proceeded to arrest the person in charge and then to execute the warrant. In searching a closet for the items listed in the search warrant, they came across an incriminating ledger - concededly not covered by the warrant - which they also seized. The Court per Justice Butler upheld the seizure of the ledger as incidental to the lawful arrest rather than on the basis of the search warrant since since the agents "had a right without a warrant contemporaneously to search the place in order to

to find and seize the things used to carry on the criminal enterprise." [id. at 199]. Within a half-dozen years the identical Justice in prosecutions under the identical statute involving warrantless searches conducted contemporaneously at the scene of valid arrests made pursuant to valid arrest warrants twice overruled himself in this case. Go-Bart Importing Co. v. United States, supra, 282 U.S. 344; United States v. Lefkowitz, supra, 285 U.S. 452.

The second case was Harris v. United States, 1947, 331 U.S. 145, in which Federal officers made a search without a search warrant - this time of a four room apartment - contemporaneously with a valid arrest made there pursuant to a valid warrant of arrest. The officers had obtained the arrest warrant for Harris for his alleged interstate transportation and cashing of a forged check. Harris was arrested under the warrant in his living room, and the officers began a search, protracted in duration (several hours), intensive in nature (several agents exploring) and extensive in latitude (the entire apartment), in their quest for two cancelled checks believed to have been used in effecting the forgery. Inside a desk drawer in the bedroom, they found a sealed envelope with the notation, "George Harris, personal papers." Tearing it open, they found it to contain incriminating altered selective service documents, and these were used to procure Harris' conviction under a statute different from the one under which the warrant for his arrest had been procured. By 5-4, the Court upheld the conviction on the basis of this serendipitous discovery.

The last of the three aberrations was United States v. Rabinowitz, 1950, 339 U.S. 56. Federal authorities obtained information that large numbers of postage stamps bearing forged overprints had been delivered to Rabinowitz in his one-room loft office. A postal employee visited the office and bought four stamps. Within a few days, an expert determined that the overprints on these stamps were forgeries. The technique of law enforcement to seek a warrant of arrest rather than one for search and seizure, approved in Harris and disapproved in Trupiano, was followed. Agents and two experts made the second visitation to the loft office, executed the arrest warrant and proceeded to search the desk, safe and file cabinets for an hour and a half. They discovered and seized 573 stamps with forged overprints. Rabinowitz was convicted on each of two counts of an indictment, the first charging the sale of four stamps, knowing they were forged, and the second, possession with intent to defraud of the 573 stamps. Relying upon Trupiano, this Court reversed because the officers failed to obtain a search warrant when they had both ample grounds and time to do so. Although the first count involved neither search nor seizure, the element of knowledge of forgery - difficult to establish from possession of only four stamps in an inventory of myriad non-forged ones -was easily proven by the warrantlessly seized 573 stamps charged in the second count. The Supreme Court, three Justices dissenting, upheld conviction on both counts and reversed this Court. In doing so, the Supreme Court overruled Trupiano and its requirement that a search warrant

must first be obtained whenever practicable, followed the holding in Harris that an arrest warrant sufficed, and resurrected the rule announced in Marron that seizure of items not contained in a search warrant may still be justified as incidental to a lawful arrest - a rule twice discredited by its author, Justice Butler, within a half-dozen years. The opinion of the Court in Rabinowitz contains the formidable suggestion that there may be no rule at all governing warrantless searches of places incidental to a lawful arrest: "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case. * * * Reasonableness is in the first instance for the District Court to determine." United States v. Rabinowitz, supra, 339 U.S. at 63.

With respect to the warrantless nature of the search and seizure in this case, the cornerstone of the theory of the State prosecutor rests squarely on Rabinowitz. In his only brief submitted to the State appellate courts - that disposed of the matter without opinion - the prosecutor argued that the police without any warrant

> "certainly had the right to search the three rooms of the apartment for evidence of both the crimes of Murder and Possession of a Dangerous Drug (United States v. Rabinowitz, 339 US 56; * * *)." [Respondent's Brief, Appellate Division, Second Department, Supreme Court, State of New York, 10] 32

32. Id., par. TWENTY-SEVENTH (24).

On June 23, 1969, four years before the disclosure in the State courts of the basis of its prosecution in this case and nineteen months before the facts in this case arose, the Supreme Court explicitly overruled Rabinowitz with an unusual and pointed warning against reliance upon it:

> "Rabinowitz and Harris have been the subject of critical commentary for many years, and have been relied upon less and less in our own decisions. It is time, for the reasons we have stated, to hold that on their own facts, and insofar as the principles they stand for are inconsistent with those that we have endorsed today, they are no longer to be followed."
>
> Chimel v. California, supra, 395 U.S. 752 at 768.

Besides the non-existence of any basis in authority for the warrantless search in this case, even the survival of the rules in Rabinowitz and Harris would not support the search in this case:

> [i] Prior judicial approval had been obtained in Rabinowitz and Harris in the form of valid arrest warrants; none was ever obtained in this case.
> [ii] In Rabinowitz and Harris valid arrests pursuant to these warrants had been made and the search made incidental to and contemporaneously with the execution of the warrants; in this case no claim has ever been made by the prosecution that the seizure of the person of the appellant by the police was ever a valid arrest even without an arrest warrant.
> [iii] In intensity (number of police searching), extensiveness of area and duration, the search in this case grossly exceeded the three-man search of a one-room loft office for an hour-and-a-half

in Rabinowitz, or the five-man search for several hours of a four-room apartment in Harris. In this case, six rooms were searched by at least a dozen police officers from the beginning of their entry at about 1:45 A.M., January 24, 1971[33] Literally, a siege of apartment 15A was maintained by the police until February 17, 1971, twenty-four days, during which additional evidence was being gathered [APPENDIX TO APPELLANT'S BRIEF, post]. Literally, without any warrant whatsoever - either arrest or search - appellant's home was gutted by the police. Cf. Kremen v. United States, 1957, 353 U.S. 346.

Rational Basis of Prior Judicial Approval

The rationale of the requirement of a search warrant before the police undertake any rummaging in a home, first and most succinctly stated by Justice Jackson [ante, page 22] and widely quoted and followed, that inferences concerning probable cause and particularization "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime", has been criticised on the ground of the ineffectiveness of the conscience of the magistrate as a barrier between the privacy of the people and the indiscretion or overzeal of the police. This ineffectiveness stems from the blind automaticity with which warrants frequently issue so far as actual participation of the judicial officer is concerned. Notwithstanding the perfunctory manner in which warrants are often obtained, the police remain reluctant to seek them. In 1966, at the time of the warrantless seizure in the Chimel case [395 U.S. 752, supra],

33. Id., par. SIXTEENTH (13-14).

only 17 warrants were obtained in the investigation of 29,084 complaints of serious crimes reported to the police agency involved. N.Y. Times, Dec. 1, 1968, Sec. 4 at 9. This represented police applications in fewer than one in a thousand cases.

Numerous reasons, pragmatic, tactical and strategic, support the reluctance of the police. On the local level, there is an inherent adversion to "paperwork" by the average two-finger typist police detective. Even when typing service is available to the police agency, such as the Federal Bureau of Investigation, tactical and strategic considerations obviate against applications for search warrants. Some paper, in the form of applications for arrest warrants may be tendered to appease the demand of the conscience of some courts for documentation preceding any rummaging, such as in the Harris, Trupiano, Rabinowitz and Chimel cases. But the ghost of the holding in the Go-Bart Importing case, supra, 282 U.S. 344 still looms. In that case, a search warrant had actually been procured but conviction was reversed because papers not covered by the warrant had been seized. Thus, the safer route of an arrest warrant suggested itself. In the now-overruled Harris case, supra, 331 U.S. 145, the non-use of a search warrant enabled the Government to prevail upon the pure serendipity of finding, seizing and introducing in evidence of papers totally unrelated to the charge contained in the arrest warrant executed against defendant.

Two rationales survive the automaticity of issuance of warrants and the reluctance notwithstanding of the police to seek them for the historic Constitutional requirement

of prior judicial approval for search of a person's home:

[i] To provide a recorded standard against which ex post facto reconstruction of complex happenings by police testimony may be measured:

> "[T]he policeman perceives his job not simply as requiring that he arrest where he finds probable cause. In addition, he sees the need to be able to reconstruct a set of complex happenings in such a way that, subsequent to the arrest, probable cause can be found according to appellate court standards. In this way, as one district attorney expressed it, 'the policeman fabricates probable cause.' By saying this, he did not mean to assert that the policeman is a liar, but rather that he finds it necessary to construct an ex post facto description of the preceding events so that these conform to the legal arrest requirements, whether in fact the events actually did so or not at the time of arrest. Thus, the policeman respects the necessity of 'complying' with the arrest laws. His 'compliance', however, may take the form of post hoc manipulation of the facts rather than before-the-fact behavior." [Skolnick, Justice Without Trial 214-215 (1966)]

In this case, the testimony of Officer Drexel at trial (36-82) at first blush appears to refute this ex post facto reconstruction justification of prior judicial approval for the search. Drexel, first police officer on the scene, forcibly seized the person of the appellant at the elevator, literally carried her into another apartment, confined her there behind closed doors for twenty minutes, interrogated her without any Miranda warnings, overheard the orders of his superiors to get her back into her own apartment, guarded

her there briefly for "approximately maybe 2 or 3 minutes", during which the appellant sat on a couch in the living room and some dozen police officers ransacked the apartment "opening drawers and stuff like that, going into closets" [ante, page 11]. Officer Drexel was never produced at the pre-trial suppression hearing by the prosecution who alone was aware of his identity, and following his testimony at trial the presiding judge indicated that he was not free to re-open the hearing upon repeated applications on her behalf [post, POINT X]. The testimony of all police officers is to the effect that there never was any probable cause or even "articulable suspicion" for the seizure of the person of appellant at the elevator [ibid.].

The ex post facto reconstruction, under these circumstances, required countervailing testimony. This was supplied by Stypulkoski, a detective who arrived long after the ransacking of the apartment by his fellow officers had been underway and stated that the appellant agreed to the search of the apartment as long as they don't tear it up (110), and that of Sardo, a superior officer of the uniformed force in no way connected with the investigation, who testified that appellant agreed to allow them to look around for the murder weapon (ibid.).

[ii] To assure particularization. The experience of law enforcement in the Go-Bart case, ante, point up the pitfalls of specifying in advance the itemization of articles to be seized required in any warrant of search by the Fourth Amendment. This Court, through two of its Judges, has supplied a

persuasive reason for insisting upon observance of the Constitutional requirement of prior judicial approval before any police rummaging of a home. Judge Learned Hand said:

> "[T]he real evil aimed at by the Fourth Amendment is the search itself, that the invasion of a man's privacy which consists in rummaging about among his effects to secure evidence against him. * * * Nevertheless limitations upon the fruit to be gathered tend to limit the quest itself * * *. [United States v. Poller, 1930, 43 F.2d 911 at 914].

Judge Friendly observed that these "statements afford the best clue to the formulation of any new limitation that we have been able to conceive." [United States v. Bennett, 1969, 409 F.2d 888].

> The "few specifically established and well-delineated exceptions * * * jealously guarded and carefully drawn * * * showing that those who seek exemption [show] that the exigencies of the situation made that course imperative."

The Supreme Court has recognized several "specifically established and well-delineated exceptions * * * jealously guarded and carefully drawn," [Coolidge v. New Hampshire, supra, 403 U.S. at 354-55] that constitute "some grave emergency", [McDonald v. United States, supra, 333 U.S. at 455]. None apply in this case:

> [i] Search of the person after valid arrest. The person of a defendant may searched without any prior warrant of search following a valid arrest made with or without warrant of arrest. United States v. Robinson, 1973, 414 U.S. 219; Gustafson v. Florida, 1973, 414 U.S. 260; United States v. Edwards, 1974, ____U.S. ___, 94 S.Ct. 1234, 39 L.Ed.2d 711. No search of any person arrested is the basis of application for the Writ of Habeas Corpus in this case.

[ii] Hot pursuit of a felon. A search of a place without warrant constitutes "some grave emergency" and an exception from the warrant requirement. Warden v. Hayden, 1967, 387 U.S. 294. Although appellant's person was seized as she was attempting to leave on the elevator after a homicide had been committed, it is extremely clear that before any rummaging of apartment 15A was conducted, the appellant was never considered a perpetrator either of the homicide or of any other crime.

[iii] Automobiles carrying contraband on the highway. Upon probable cause an automobile carrying contraband upon a public highway may be the subject of a warrantless search. Brinegar v. United States, 1949, 338 U.S. 160; Carroll v. United States, 1925, 267 U.S. 132. No vehicle is involved in this case.

[iv] Motor vehicles impounded after valid arrest for for possession of narcotics and awaiting forfeiture pursuant to state statute may be the subject of a warrantless search. Cooper v. California, 1967, 368 U.S. 58. Narcotics are involved in this case, but clearly not within any vehicle.

[v] Abandonment has been acknowledged as a basis for warrantless search of premises, Abel v. United States, 1960, 362 U.S. 683, but forcible removal of appellant by the police from the apartment does not constitute any license to search the premises for twenty-four days thereafter for evidence against her.

[vi] Consent has also been recognized as a basis for such warrantless search, at least in the case of an automobile carrying contraband upon a public highway. Schneckloth v. Bustamonte, 1973, 412 U.S. 18. But a warrantless seizure of appellant upon proof far short of probable cause that she committed any crime, and her forcible removal to the apartment of a third person constitutes nothing more than submission to ostensible lawful authority.

P O I N T I I

Seizure of the person of petitioner was without probable cause and flatly violated the Fourth Amendment.

One of the first two police officers on the scene, Drexel, testified, "So I grabbed the woman and detained her." She was struggling as he took her physically, "Because I was grabbing her" [34] Having seized her body, Drexel forcibly removed her to apartment 15 B, confined her there and subjected her to interrogation. He took petitioner physically into 15 B. "[Y]ou know the door was closed after I put her in there. I closed the door." In the initial stages of his encounter with petitioner, any suspicion of her complicity in the homicide arising from a cry of a spectator in the public hallway, "Stop that woman, that's his wife," was quickly dispelled. "I didn't ask to [sic] much. And well I asked her. Did anybody come to the door, did she see anything and she stated no."[35] Drexel also determined during his interrogation of petitioner that she lived in apartment 15 A.[36] Drexel had also observed Madden's body lying face down in the public hallway. "[T]here was a weapon there * * * I think it was an automatic, I am not to[sic] sure, it was lying on the side of his body * * * on the left side. No [the arm and hand of the deceased were not near the weapon] it was sort of in the middle when I first seen it." Confirming his belief that the weapon was an "automatic", i.e., one mechanically and without manual action expending spent or empty shells, Drexel testified, "Yes, we observed 5 spent shells,

34. Id., par. TENTH (9).
35. Id., par. ELEVENTH. (10).
36. Id., par. TWELFTH (10).

empty shells which was marked by the detective with chalk * * * all the way down the corridor." Officer Drexel, who remained between two and one-half to three hours at the scene, never found any occasion to look around for anything that might be a murder weapon.[37]

Stuypulkowski, the homicide detective, arrived shortly after the homicide, at "one fifty-five or two," about two to two and one-half hours before petitioner was removed to the station house.[38] Like Drexel, he observed the automatic handgun lying on the floor of the public hallway.[39] He found two eyewitnesses to the homicide. Both identified the perpetrator as a "male [who] emerged and struck Madden and shot him and then continued in a southerly direction in the hallway until he dropped."[40] With Parisi, the other detective already on the scene, Stuypulkowski assumed charge of the investigation as members of the detective unit, notwithstanding the presence of police officers of higher rank but assigned to the patrol force. Sardo, with the rank of lieutenant in the patrol force, was uncertain whether or not there had "been a gun on the floor" of the public hallway. "[T] his aspect of the investigation is not mine."[41] "[T]hat aspect of it belonged to the Detective Division who superseded me in certain areas." The areas in which the Detective Division superseded Sardo were "the investigation of it and if they feel that I am interfering"[42] There

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37. Id., par. SIXTH (7).
38. Id., par. EIGHTH, NINETEENTH (8, 15).
39. Transcript, Suppression Hearing at page 97.
40. Pet., par. FIFTH (6).
41. Transcript, Suppression Hearing at page 28.
42. Id., at page 29.

was a detective in charge of the investigation that night, and his role as a ranking officer in the patrol force was that of rendering assistance to the detective unit. "I believe I was" helping the detectives.[43] Notwithstanding his uncertainty about whether or not the murder weapon was lying on the floor of the hallway and his non-charge of the investigation of the crime, Sardo entered apartment 15 A and undertook its search for that item. "Yes," I was looking for the gun.[44]

All three officers were agreed that, so far from the existence of probable cause to seize, remove, detain, and prolong that detention of petitioner, there was not even suspicion of her complicity in any crime. According to Parisi, "Deidre at no time during that part of the investigation was any kind of a suspect whatsoever." According to Stypulkowski, "she was not a suspect at that time in my estimation."[45] And Sardo, while proclaiming that "Everybody is a suspect to me," and that petitioner fitted into that category, admitted, "No, I didn't have anything specific to hang my hat on."[46]

In United States v. Di Re, 1948, 332 U.S. 581, the Court made governing law the "reasonable cause" provision contained in the New York statute relating to arrests without warrants - applicable to the seizure of petitioner in the instant case. N.Y. Code of Criminal Procedure § 177 (3). An informant related that one Buttitta was to sell him counterfeit gasoline ration coupons. Alongside Buttita in the front seat sat Di Re, with the informant in the rear of an automobile at the time of

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43. Id., at page 30.
44. Id., at page 50.
45. Pet., par. EIGHTH (8).
46. Id., par. TWENTY-SECOND (19).

arrest by local police cooperating with Federal authorities. Di Re complied with a police direction to put the contents of his pockets on a table at the police station and these included gasoline and fuel oil ration coupons that he said he found in the street. Later, in a thorough search of his person, one hundred gasoline ration coupons were found in an envelope concealed between his shirt and underwear. All were found to be counterfeit. The Court held the arrest of Di Re invalid and the fruits of that arrest seized from his person inadmissible in a Federal prosecution. The identical "reasonable cause" requirement of the New York statute for lawful arrest that governs in the instant case was not met by the presence of Di Re alongside Buttitta in the automobile. With respect to consent to the seizure and search of his person to be inferred from the submissiveness of Di Re to the police, the Court observed per Mr. Justice Jackson [332 U.S. at 594-95]:

> "The Government also makes, and several times repeats, an argument to the effect that the officers could infer probable cause from the fact that Di Re did not protest his arrest, did not at once assert his innocence, and silently accepted the command to go along to the police station. One has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases. But courts will hardly penalize failure to display a spirit of resistance or to hold futile debates on legal issues in the public highway with an officer of the law. A layman may not find it expedient to hazard resistance on his own judgment of the law at a time when he cannot know what information, correct or incorrect, the officers may be acting upon. It is likely to end in fruitless and unseemly controversy in a public street, if not in an additional charge of resisting an officer. If the officers believed

"they had probable cause for his arrest on a felony charge, it is not to be supposed that they would have been dissuaded by his profession of innocence.

"It is the right of one placed under arrest to submit to custody and to reserve his defenses for the neutral tribunals erected by the law for the purpose of judging his case. An inference of probable cause from a failure to engage in discussion of the merits of the charge with arresting officers is unwarranted. Probable cause cannot be found from submissiveness, and the presumption of innocence is not lost or impaired by neglect to argue with a policeman. It is the officer's responsibility what he is arresting for, and why, and one in the unhappy plight of being taken into custody is not required to test the legality of the arrest before the officer who is making it."

The "undoubted right to resist an unlawful arrest", at that time the law in New York, People v. Cherry, 1954, 307 N.Y. 308, has since been taken away by statute, effective March 21, 1968 and governing the circumstances of the instant case. Laws of New York, 1968, c. 73, § 7; Penal Law § 35.27. The "right of one placed under arrest to submit" had become a duty at the time of this case, and non-submission involving substantial pain to the officer could result in conviction of felonious assault with punishment up to seven years' imprisonment. N.Y. Penal Law § 120.05 (3).

Regardless of the particular State or the wording of its law of arrest, detentions must be viewed as "persons * * * seized" as those words appear in the Fourth Amendment, and when they occur in the absence of probable cause their evidentiary fruits must be suppressed. In Davis v. Mississippi, 1969, 394 U.S. 721,

the Court observed [394 U.S. at 726-27]:

> "It is true that at the time of the December 3 detention the police had no intention of charging petitioner with the crime and were far from making him the primary focus of their investigation. But to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions' [Ftn.6] We made this explicit only last Term in Terry v. Ohio, 392 U.S. 1, 19, when we rejected 'the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest or a full-blown search".
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> [Ftn.6]"The State relies on various statements in our cases which approve general questioning of citizens in the course of investigating a crime. * * * But these statements merely reiterated the settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer."[47]

Sub-arrest detention on the basis of something less than probable cause, 'articulable suspicion', cannot be invoked in this case. In Terry v. Ohio, 1968, 392 U.S. 1 at 30, the Court held:

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47. Consider, in this regard, A.L.I., Model Code of Pre-Arraignment Procedure § 110.2 (Proposed Official Draft No. 1, 1972) in which recommendation is made authorizing a law enforcement officer to "order" a person "for such period as is reasonably necessary for the accomplishment of the purposes authorized in this subsection, but in no case for more than twenty minutes." [Emphasis supplied].

> "We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him."

As if to point up the limitation that "the persons with whom he is dealing may be armed and presently dangerous," the officer's "reasonable fear for his own or others' safety," and the "carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him," on the same day the Court nullified a search for narcotics based upon "articulable suspicion" fortified by eight hours of surveillance that the defendant had them in his possession. Sibron v. New York, 392 U.S. 40.

No search was ever made of the person of petitioner prior to her removal to the police station. Sardo testified that he did not cause her to be searched and that he was not even tempted by the possibility that petitioner might be carrying a concealed weapon.[48]

In the absence of probable cause of petitioner's complicity

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48. Pet. , par. TWENTY-THIRD (20).

in the commission of any crime, no valid arrest could be made without a warrant, and no grounds existed for the issuance of a valid warrant of arrest. Even if claim could be made of "articulable suspicion" - and it has not been made by the police - no "carefully limited search" was ever made by any police officer "in an attempt to discover weapons which might be used to assault him." The only lawful manner of detaining petitioner was that provided for by statute then in force and effect for detention of material witnesses for the People who are both necessary and material. N.Y. Code of Criminal Procedure § 618-b. This requires prior judicial approval. In fact, application was made for such detention, but it was made eleven days after the fact of petitioner's seizure[49]. Such order can have no retroactive effect. In re Wendel, 1940, 173 Misc. 819, 18 N.Y.S.2d 586 (Sup. Ct., Kings Co.). Moreover, such order may lawfully issue only in a pending action, such as a grand jury investigation, and not one conducted by the police or even the prosecutor. People ex rel. Van Der Beck v. McCloskey, 1963, 18 A.D.2d 205, 238 N.Y.S.2d 676 (1stDep't). See also Bacon v. United States, 9 Cir., 1971, 449 F.2d 933, reversing Boldt, D.J. [strict comparable requirements under FRCP rule 46(b), 18 U.S.C. § 3149].

P O I N T I I I

Exploitation of the unlawful seizure, removal, detention and prolonged detention of petitioner assured her presence in premises in which contraband was seized and that presence supported her conviction for its possession.

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49. Id., par. TWENTY-FOURTH (20-21).

By dint of the unlawful seizure and detention of petitioner, her physical presence was assured in the premises at the time the police conducted a search of areas other than the room in which she was present. The evidence seized upon that search constituted proof introduced against petitioner at trial and on its basis petitioner was found guilty. The theory of their case, expressed by the prosecution, was that "the defendant knowingly possessed the heroin and cocaine. 'Knowledge, of course, may be shown circumstantially * * *. Generally, possession suffices to permit the inference that the possessor knows what he posses especially, but not exclusively, if it is * * * on his premises." The unlawfully compelled presence of petitioner in the living room while hordes of police rummaged closets in other rooms of the premises was a primary illegality. The evidence searched for and seized, and introduced at trial against petitioner was "the fruit of the poisonous tree." This evidence not only would not have come to light but for the illegal actions of the police but also because it has been come at by exploitation of that illegality.[50]

As Judge Learned Hand wrote [United States v. Kirchenblatt, 2 Cir., 1926, 16 F.2d 202 at 203]:

> "After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises;

50. Id., par. TWENTY-SIXTH (22).

"but it is small consolation to know that one's papers are safe only so long as one is not at home." [Emphasis supplied].

The uninvited entry of the police officers into petitioner's living quarters has been set forth [ante, pages 10-11]. In Wong Sun v. United States, 1963, 371 U.S. 471 at 484, 488, the Court held:

> "Thus we conclude that the Court of Appeals' finding that the officers' uninvited entry into Toy's living quarters was unlawful and that the bedroom arrest which followed was likewise unlawful was fully justified on the evidence. It remains to be seen what consequences flow from this conclusion.
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> * * *
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> "We think it clear that the narcotics were 'come at by the exploitation of that illegality' and hence that they may not be used against Toy."

In United States v. Edmons, 2 Cir., 1970, 432 F.2d 577 at 584, the Court, in reversing a conviction, said:

> "The Government 'exploits' an unlawful arrest when it obtains a conviction on the basis of the very evidence, not shown to have been otherwise procurable, which it hoped to obtain by its unconstitutional act."

See also Davis v. Mississippi, supra, 394 U.S. 721; United States v. Guana-Sanchez, 7 Cir., 1973, 484 F.2d 590 at 592.

The doctrine of"taint" requiring exclusion of evidence is more than a half-century old in the Federal Courts. Its genesis was in Silverthorne Lumber Co. v. United States, 1920, 251 U.S. 385, in which Federal officers unlawfully seized certain documents belonging to the Silverthornes and pre-

sented them to a grand jury that already had indicted them and their company. A District Court ordered the return of the documents, but impounded photographs of the originals. The prosecutor then caused the grand jury to issue subpoenas to the defendants to produce the originals, and their refusal had led to a contempt citation. In holding that the subpoenas were invalid because based on knowledge obtained from unlawfully seized evidence, the Court per Justice Holmes said:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

In Nardone v. United States, 1939, 308 U.S. 338, in which the phrase "fruit of the poisonous tree" was first used, the Court per Justice Frankfurter refused to permit the prosecution to avoid inquiry into its use of information obtained from unlawful wiretapping. "[T]o forbid the direct use of methods * * * but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty'".

P O I N T I V

Seizure of petitioner in the public hallway outside her apartment, her forcible removal and detention in another apartment can under no precedent sustain the validity of a search of her apartment.

In Vale v. Louisiana, 1970, 399 U.S. 30, unlike the instant case, prior judicial approval had been obtained in the form of two warrants for Vale's arrest. The police set up a surveillance outside his house. They observed a car drive up and sound the horn twice. Vale came out of his house, had a brief conversation with the driver, looked up and down the street and then returned to the house. A few minutes later he reappeared on the porch, looked cautiously up and down the street, and then proceeded to the car and leaned through the window. Convinced that a narcotics sale had just occurred, the police approached. Vale retreated toward his house while the driver of the car began driving off. The police blocked the car and saw the driver place something in his mouth. Vale was then arrested on his front steps and the police advised him they were going to search the house. A quantity of narcotics were found in a rear bedroom and introduced in evidence at his trial. In reversing the conviction, the Court said, per Mr. Justice Stewart [399 U.S. at 33 -34]:

> "But even if Chimel [Chimel v. California, 1969, 395 U.S. 752, post, page 47] is not accorded retroactive effect * * * no precedent of this Court can sustain the constitutional validity of the search in the case before us.
>
> "A search may be incident to an arrest 'only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest' [citing Shipley v. California, 395 U.S. 818, 819; Stoner v. California, 376 U.S. 483, 486]. If a search of a house is to be upheld as incident to an arrest, that arrest must take place inside the house, cf. Agnello v. United States, 269 U.S. 20, 32, not somewhere outside - whether two blocks away

"[citing James v. Lcuisiana, 382 U.S.36], twenty feet away [citing Shipley, supra], or on the sidewalk near the front steps. 'Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant.' [citing Agnello, supra, 269 U.S. at 33]. That basic rule 'has never been questioned in this Court.' [citing Stoner, supra, 376 U.S. at 487 n.5]."

P O I N T V

Search of rooms, closets and drawers, other than the room in which petitioner was being detained violated the Fourth Amendment.

An exploratory search of a closet in a den, a room adjoining the living room in which petitioner was being detained on a sofa, uncovered a quantity of narcotics that were introduced in evidence against her at trial. During the police presence in apartment 15 A, no claim has ever been made that petitioner visited that room [ante, pages 11-13]. The prosecution argued in the State court that the police "certainly had the right to search the three rooms of the apartment for evidence of both the crimes of Murder and Possession of a Dangerous Drug (United States v. Rabinowitz, 339 US 56; * * *)."[51] In Chimel v. California, supra, 395 U.S. 752, the Court per Mr. Justice Stewart held such a search violative of the Fourth Amendment. Chimel was decided on June 23, 1969 - a year and seven months before the facts in the instant case arose. With respect to the argument of the prosecution, the Court held that Rabinowitz, on its facts

51. Id., par. TWENTY-SEVENTH (24).

and principles is "no longer to be followed" [ante, page 27]. In Chimel, essentially the facts were similar to Rabinowitz: procurement of an arrest - rather than a search warrant, its valid execution and a contemporaneous and warrantless search of the place of arrest about equal in duration. Differences were minor:numismatics rather than philately was the concern, since Chimel was suspected of burglarizing a coin shop and Rabinowitz with vending stamps with enhancing but forged overprints; the officers were state ones in Chimel rather than Federal in Rabinowitz; the place of search in Chimel wa a three-bedroom house, including attic, garage and small workshop, rather than a one-room loft office in Rabinowitz; and the incriminating quest was found in the master bedroom and sewing room in Chimel, rather than in desk, safe and file cabinets in Rabinowitz. The Court laid down a rule governing what place may validly be searched without prior judicial approval upon the exception to the "per se unreasonable" rule for warrantless searches incidental to a valid arrest [id. at 768]:

> "[T]he area from within which he might have obtained either a weapon or something that could have been used as evidence against him."

In this case, the appellant at no time during the rummaging of the apartment was ever in the den from whose closed-door closet containing guns and exclusively male apparel, incriminating narcotics were found and introduced against her in evidence. Appellant was never charged with possession of the guns in that closet. Nor was she ever even suspected of possessing a weapon.

POINT VI

Search of petitioner's living quarters without warrant following her removal to the police station violated the Fourth Amendment.

Sardo testified that after petitioner was taken out of apartment 15 A to the police station, "There was a detailed search by the detectives and other patrolmen were called in." After she left the apartment, he "continued with the search with the rest of the personnel." Numerous articles were found and introduced in evidence against petitioner. After she left the apartment, Sardo continued, "I glanced through the closets at this point. We had ample assistance and the detectives were making a thorough search."[52] Without retroactive application of the principles of Chimel v. California, supra, 395 U.S. 752, in Coolidge v. New Hampshire, 1971, 403 U.S. 443 at 455-57, the Court, again per Mr. Justice Stewart, held that such warrantless post-arrest search - even of an automobile - violated the Fourth Amendment.

This case presents the long distance record of any in the recorded annals of search and seizure warrantlessly of a residence after arrest and removal of its occupant [APPENDIX, post].

POINT VII

Failure of the police to give petitioner prescribed warnings of her Constitutional rights during her detention and interrogation and even following announcement of a formal charge against her violated the Fifth and Sixth Amendments.

52. Id., par. TWENTY-EIGHTH (24).

No claim is made by the police that ~~any warnings~~ were given petitioner about her Constitutional rights during the two and one-half hour period of her seizure, detention and interrogation on the fifteenth floor of 1841 Central Park Avenue.[53] Even upon the first announcement of a criminal charge against her, no such advice is claimed to have been offered.[54] She was deprived of her freedom of action in numerous significant - and frequently shocking - ways.[55] Statements made by her during that time were admitted in evidence against her at trial. This violated the Fifth and Sixth Amendments. In Orozco v. Texas, 1969, 394 U.S. 324, a conviction of murder was reversed. Said the Court [394 U.S. at 326-27]:

> "The State has argued here that since petitioner was interrogated on his own bed, in familiar surroundings, our Miranda holding should not apply. It is true that the Court did say in Miranda that 'compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.' 384 U.S., at 461. But the opinion iterated and reiterated the absolute necessity for officers interrogating people 'in custody' to give the described warnings. See Mathis v. United States, 391 U.S. 1. * * * The Miranda opinion declared that the warnings were required when the person being interrogated was 'in custody at the station or otherwise deprived of his freedom of action in any significant way.' 384 U.S., at 477 (Emphasis supplied)."

53. Id., par. NINETEENTH (15-16).
54. Id., par. TWENTIETH (16-17).
55. Id., par. TENTH, ELEVENTH, TWELFTH, FOURTEENTH, FIFTEENTH, NINETEENTH, TWENTIETH and TWENTY-FIRST (9,10, 10-11, 11, 12-13, 15-16, 16-17, 17-19).

POINT VIII

The prosecutor failed to sustain his burden of proving that any alleged consent by petitioner was, in fact, freely and voluntarily given, and not acquiescence to a claim of lawful authority.

No claim has been made by Parisi that he was ever given consent by petitioner to search apartment 15 A [ante, page 11, n. 20]. Yet his exploratory search of a closet in the den - a room adjoining the living room and one in which petitioner was never present during her detention and interrogation in apartment 15 A - turned up 3,390 bags of heroin that was admitted in evidence against petitioner at trial [ante, pages 11-12]. Because this evidence was plainly damaging evidence against the petitioner with respect to all two charges against her, its admission at the trial was not harmless error. Bumper v. North Carolina, 1968, 391 U.S. 543 at 550; Chapman v. State of California, 1967, 386 U.S. 18.

Accordingly, no question of consent is validly presented by the facts of this case.

In Bumper, supra, 391 U.S. at 548-49, the Court, per Mr. Justice Stewart, thus formulated the rule on consent to search:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority."

In that case, a conviction of rape with sentence of life imprisonment was reversed. During the trial, a .22 calibre rifle was admitted in evidence. It had been obtained from

his mother at his home when four law enforcement officers appeared at the door announcing that they had a search warrant and were invited in. The defendant's mother also testified at a suppression hearing [391 U.S. at 547 n.8]:

> "I had no objection to them making a search of my house. I was willing to let them look in any room or drawer in my house they wanted to. Nobody threatened me with anything. Nobody told me they were going to hurt me if I didn't let them search my house. * * * I let them search, and it was all my own free will. Nobody forced me at all."

Schneckloth v. Bustamonte, 412 U.S. 18, was decided on May 29, 1973, more than two years and four months after the facts in the instant case arose. Its retroactive application to this case is unlikely. See Williams v. United States, 1971, 401 U.S. 646 [holding the principles announced in Chimel, supra, inapplicable to searches occurring before the date of decision in that case]. The opinion of the Court, once again by Mr. Justice Stewart, reiterated the test of voluntariness announced in Bumper, supra [412 U.S. at E]:

> "Our decision today is a narrow one. We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of of his consent, the Fourth and Fourteenth Amendments require that it demonstrate the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."

The facts in Bustamonte suggest the reason for the nar-

rowness of the decision. An automobile containing six men was halted on the public highway by the police at 2:40 A.M. because of defective lights. The operator of the vehicle could produce no driver's license. Only one the six, Alcala, could produce identification, in the form of an operator's license. He said the vehicle belonged to his brother. Upon request by the police to look into the vehicle, Alcala responded, "Sure, go ahead," and actually helped by opening the trunk and glove compartment. There was no threat of detention, implied or express, prior to the search. Police testimony was uncontradicted that "all was very congenial." The contraband seized and introduced in evidence consisted of three checks stolen from a local car wash and found on the left rear seat. See Carroll v. United States, supra, 267 U.S. 132; Brinegar v. United States, supra, 338 U.S. 160.

The host circuit that suffered reversal has experienced no problems in applying Bustamonte. In United States v. Marshall, 9 Cir., 1973, 488 F.2d 1169, the District Court on the basis of mutually confirmatory testimony of Federal agents that they were invited to enter after a knock at the door held the seizure of narcotics inside the house the product of a consent search. On the basis of the "clearly erroneous" rule, the Court of Appeals reversed, citing Bustamonte. In United States v. Rothman, 9 Cir., 1974, 492 F.2d 1260, the Court again reversed, citing Bustamonte. Defendant had been detained at an airport when a ticket agent believed that he fitted the profile of a potential airplane hijacker, and had grabbed a deputy marshal's hand and jerked him a few feet. His bag which had been placed on the plane was removed and defendant was found to have said,

"Why don't you go ahead and open the bags? * * *What is the use of going through all this, go ahead and open the bags, it is okay." When the deputy marshal refused, defendant took the keys which had been placed in front of him and opened his luggage which contained 39 kilos of marijuana, for the possession of which he was convicted.

On trial in the instant case, petitioner testified that prior to leaving apartment 15 A to take the elevator, she went to Madden's closet in his den to take his metal box that contained his papers and money. A bag containing glassene envelopes fell to the floor.[56]

The ultimate question remains like a ghost and was raised a decade ago. Pekar v. United States, D.C.Cir., 1963, 315 F.2d 319,325:

> "No sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered. * * * [W]ords or signs of acquiescence in the search accompanied by denial of guilt do not show consent; * * *."

In Harless v. Turner, 1971, 404 U.S. 932, on the question of consent by a defendant to a search of his automobile for evidence that he committed rape after the police had visited his home and "induced" him to accompany them, the Court remanded to the Court of Appeals for reconsideration denial of habeas corpus to a State prisoner. The Court of Appeals reconsidered, and on the question of consent, found that "the defendant was asked on the way out to the car whether he would consent to their searching the car and he agreed." Id., 1972, 456 F.2d 1337 at 1338 (10th Cir.). The number of

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56. Transcript, Trial, at page 1247.

police officers in the visiting delegation to Harless was given at "four or five in number". In this case there was a minimum of a dozen officers present during all of the rummaging. The Court of Appeals set Harless free.

P O I N T I X

The identical judge presided both at trial and pre-trial hearing. Testimony of a prosecution witness offered for the first time at trial - cast reasonable doubt on the pre-trial ruling. The judge refused to reconsider as a matter of law. Such fact-finding procedure was adequate neither to afford a full and fair hearing, nor to develop facts before ultimate determination, nor to provide a record that fairly supported the determination, and otherwise denied petitioner due process.

Officer Drexel was produced by the prosecution for the first time at trial. His testimony was crucial on the questions of the seizure of petitioner in the public elevator, her forcible removal through the public hallway by him, his confinement and interrogation of her in another apartment, the arrangements made by his superiors to get her back into her own apartment, her interrogation in the living room of her apartment and the general rummaging of closets and drawers in other rooms within the first two or three minutes after her arrival there.[57]

[56a] Id., APPENDIX D. (50, 51-52, 69-71, 73-74).

In Gouled v. United States, 1921, 255 U.S. 298, the Court held - on the question of suppression and return of evidence under the Fourth Amendment - the rule of practice not to reconsider the pre-trial ruling at trial must not prevail over a Constitutional right. Said the Court, per Mr. Justice Clarke[255 U.S. at 312]:

> "[T]he question really is, whether it having been decided in a motion before trial * * * the trial court, when objection was made to their [the seized papers] use on the trial, was bound to again inquire as to the unconstitutional origin of the possession of them. It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore it is not to be applied as a hard and fast formula to every case, regardless of its special circumstances. We think rather that it is a rule to be used to secure the ends of justice under the circumstances presented by each case, and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."

The Gouled case was argued by the former Associate Justice of the Supreme Court and later Chief Justice of the United States Charles Evans Hughes. With respect to the seizure of "mere evidence", the rule has been set aside. Warden v. Hayden, supra,

387 U.S. 294. The duty to reconsider at trial, regardless of procedural rules relegating this function to pre-trial procedures, has long been recognized on the Gouled determination that a Constitutional mandate supersedes. Rios v. United States, 1960, 364 U.S. 253 at 260; DiBella v. United States, 1962, 369 U.S. 121 at 130 ftn. 9; Rouse v. United States, 1966, 359 F.2d 1014 at 1016 (D.C. Cir.). The rule is also a fair one because it works two ways, both in favor and against the prosecution. In Carroll v. United States, supra, 267 U.S. 132 at 161, the Court held that a conviction would not be reversed, even though evidence at a pre-trial suppression hearing may have failed to establish probable cause for a search, since the issue was considered again at trial and there the evidence established probable cause.

The rule is especially imperative in Federal proceedings involving collateral attacks upon State judgments of conviction in New York and raising Federal Constitutional questions of suppression of evidence. Petitioner seasonably moved for pretrial hearing in accordance with State practice. There is no known device of discovery in the State - either under the Code of Criminal Procedure in force and effect at the time of occurrence of the facts in this case, or the new Criminal Procedure Law that became effective some six months later, September 1, 1971 - that can compel disclosure of the identity of witnesses. Chronologically and logically on any matter of suppression, Officer Drexel as the first policeman on the scene

and who first detained petitioner and who spent the first half hour uninterruptedly with her, should have been the first witness for the prosecution. Curiously enough he was not called at all in the suppression hearing. He was however summoned to the trial. After his testimony, the prosecution concedes that defense counsel, "Throughout the trial [he] attempted to show an unlawful entry and discovery of contraband and in summation again alleged the illegality of the entry and subsequent seizures".[57] Throughout the trial, his efforts were unavailing, the typical ruling of the trial judge being, "Well, you can't contest it in this trial, unfortunately."[58] Then on appeal, the prosecution earnestly argued, "That motion and the hearing thereon was the 'exclusive method of challenging the admissibility of evidence'" [citing the new Criminal Procedure Law § 710.70(3)].[59]

In Mooney v. Holohan, 1935, 294 U.S. 103, the Court held a State conviction void because evidence favorable to the defense was suppressed by the prosecution. The bifurcated and compartmentalized pretrial hearing and trial on issues of suppression raising Federal Constitutional questions with the gravest bearing on the innocence or guilt of petitioner, accomplishes the same result.

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57. Brief, Appellate Division, Second Dep't, page 16.

58. Transcript, Trial, at page 819.

59. See note 57.

P O I N T X

As a matter of denial of procedural due process under the Fourteenth Amendment, double hearsay testimony of the prosecutor in summation - who had also been in charge of investigating the case - deprived petitioner of a fair trial under the mosaic of circumstances of constitutional abuse in this case.

The prosecutor at trial had also been in charge of investigating this case and repeatedly made himself an unsworn witness over objection by defense counsel. In summation, he made reference to a lie detector test to which petitioner was subjected during her detention. "Deidre was not asked any questions to my knowledge I wasn't there, but I talked to him the man the state trooper who did it and he said he did not ask any questions about drugs and that is all I will say your Honor * * *."60 Under the mosaic of circumstances of constitutional abuse in this case - under the Fourth, Fifth and Sixth Amendments - this closing statement was sufficiently prejudicial to petitioner to deny her a fair trial and procedural due process under the Fourteenth Amendment. Petitioner was on trial only upon charges of knowing and unlawful possession of drugs. Berger v. United States, 1935, 295 U.S. 78 at 88.

In Donnelly v. De Christforo, 1974, 416 U.S. ___, 15 CrL 3062, five members of the Court as presently constituted, held that reversal by a Federal Court of Appeals of a denial of habeas corpus by a District Court in the case of an application by a State prisoner based upon a State prosecutor's re-

60. Pet., par THIRTY-SECOND (27).

marks upon summation that a co-defendant had pleaded guilty in mid-trial to second degree murder and that defendant hoped to be found "guilty of * * * less than first degree murder," should not have been granted review by the Supreme Court. Although the Court held, 6-3, that such remarks were not sufficiently prejudicial in the context of the entire proceeding to violate defendant's due process rights, two of the Justices who concurred in the result also concurred in this portion of the dissenting opinion - making a total of five Justices in this respect [416 U.S. ____, at ____, 15 CrL at 3077]:

> " * * *. Our federal district courts and Courts of Appeals are much closer to law administration in the respective States than are we in Washington, D.C. They are responsible federal judges who know the Federal Constitution as well as we do. Their error in issuing the Great Writ - or in refusing to do so - would in my judgment have to be egregious for us to grant a petition for certiorari. When a Court of Appeals honors the Constitution by granting the Great Writ or in its solemn judgment denies it, we should let the matter rest there, save for manifest error."

P O I N T X I

The judgment of the District Court below dismissing the application for a Writ of Habeas Corpus without any hearing whatsoever denied petitioner due process of law, considered in a procedural sense, under the Fifth Amendment, under both the circumstances of this case presented in the petition and the circumstances surrounding the disposition.

[i]

Denial of hearing

The District Court below holding that no "evidentiary hearing is necessary" denied appellant's application for the Writ of Habeas Corpus (122). Solely, with respect to the crucial evidence of Officer Drexel,[61] suppressed by the prosecution at the pre-trial hearing on exclusion in the confident assumption that disclosure of Fourth Amendment grounds rendering it inadmissible subsequently during the trial would be unavailing to the prisoner, the memorandum of the District Court demonstrates the necessity for an evidentiary hearing. That memorandum (113-122) rejected the Constitutional mandate of reconsideration at trial of the issue of suppression, set forth in Gouled [ante, page 55], Rios, DiBella and Rouse [ante, page 56] (118). Although Drexel was alone with the prisoner during the time the critical events concerning suppression of evidence on Constitutional grounds occurred, that memorandum found that the sworn evidence given by Drexel at trial was "contradicted by the testimony of other policemen", and found Drexel's testimony incredible and that of the "other policemen" veracious, all in the absence of any hearing (116). The several grounds to be relieved of the judgment of the District Court below are set forth in the affidavit in support of a motion to that effect which is still pending (142-145). Throughout the memorandum of the District Court below, the many rulings of the State judge in the suppression hearing and at trial are upheld with reference to that Judge by name (114, 115, 118, 119). Yet that Judge candidly placed on the record facts est-

61. Id., APPENDIX D (50, 51-52, 69-71, 73-74).

ablishing both that he had "doubt as to his ability to preside impartially" in this criminal case, and that he believed "his impartiality [could] reasonably be questioned." ABA Standards, Function of the Trial Judge § 1.7. Said the Judge:

> "[I] have been informed that several police officers from the City of Yonkers will be called as witnesses in this hearing. That having spent upward of ten years in the City Court of Yonkers, I am personally acquainted with the police officers and am socially acquainted with at least one of them." 62

In addition to determining the credibility of the police witnesses whose testimony was found by District Court below to contradict that of Officer Drexel while he was alone with the prisoner, a hearing on the application in this case could accomplish much more. The District Court below relied upon the Bustamonte case, supra, 412 U.S. 18, a case decided more than twenty-eight months after the facts in this case arose and accordingly of doubtful retroactive application, see Williams v. United States, supra, 401 U.S. 646 [ante, page 51]. In Bustamonte, the Court per Justice Stewart observed [412 U.S. at A]:

> "The most extensive judicial exposition of the meaning of 'voluntariness' has been developed in those cases in which the Court has had to determine the 'voluntariness' of a defendant's confession for purposes of the Fourteenth Amendment.
>
> "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of circumstances." [Id. at B].

62. Id., par. THIRTY-FIRST (26).

The test of "voluntariness" in terms of "totality of circumstances" lends itself to a simple statement; "it is in application of the voluntariness test that ambiguity has resulted. Under one test of the Court, 'the totality of circumstances that are inherently coercive', the confession is held inadmissible upon the basis of the situation alone, without inquiry into the strength or weakness of the will of the particular subject. The test is objective * * *. The cases involve interrogation of protracted duration; incommunicado detention with restricted diet; unwillingness to permit access of family, friends and counsel, especially when such individuals affirmatively seek to contact the subject; physical abuse and its threat; physical conditions of detention; absence of caution to the prisoner of his rights; whether interrogation was 'specifically designed' to elicit the police version of the 'truth', and the strength or weakness of the grounds of the police for believing the prisoner was guilty.

"On the other hand, the Supreme Court, in reviewing state convictions based upon confessions, has employed a subjective test, not unlike that suggested by the English common law in Prager [56 Cr.App.R. 151 (1971)], in its definition of 'oppression'; viz., 'the characteristics of the person who makes the statement.' An entire inventory of the accused, not necessarily available to the interrogator under prevailing views of the right against self-incrimination, determines whether or not the out-of-court statement of a person questioned in connection with a crime is admissbible. These include:

(1) age, (2) sex, (3) race, (4) physical disability, (5) mental deficiency, (6) mental illness, (7) level of formal education, (8) previous experience with police procedure, and (9) cautioniary instruction of his rights" Ludwig, Open Admissibility of Evidence in Criminal Trials [address to Appellate Judges of the United States, Honolulu, Aug. 7, 1972] 36 Queens Bar Bul. No.5, 10-11 (1973).

This case demonstrates the requirement of inquiry further into at least these "subjective" factors, in determining the voluntariness of any alleged consent to a search in this case:

[i] Age. Gallegos v. Colorado, 1962, 370 U.S. 49.
Appellant was twenty years old.

[ii] Sex. Lynumn v. Illinois, 1963, 372 U.S. 528.
Appellant was female.

[iii] Race. Beecher v. Alabama, 1967, 389 U.S. 35.
Appellant was black.

[iv] Physical disability. Greenwald v. Wisconsin, 1968, 390 U.S. 519; Beecher v. Alabama, 1967, 389 U.S. 35.
Appellant was pregnant for three months.

[v] Previous experience with police procedure. Crooker er v. California, 1958, 357 U.S. 433; Lynumn v. Illinois, supra, 372 U.S. 528.
Appellant had no such previous experience.

[vi] Cautionary instruction as to rights. Miranda v. v. Arizona, 1966, 384 U.S. 436.
Appellant had no such instruction.

In addition, a hearing might include the material contained in the APPENDIX to this brief that established, in terms of duration of a warrantless search, the long distance record.

[ii]

Circumstances Surrounding Disposition

Although the proceeding was commenced by order to show cause on October 7, 1974 (1), judgment was not made and entered until April 4, 1975 (122, 146). The statute directs that the order "shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed," and upon return, "a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed." 28 U.S.C. § 2243.

On March 12, 1975, twenty-three days before disposition of this case, the District Judge below accepted nomination as Deputy Attoney General of the United States, a position that entails supervision of joint Federal-State prosecutions for offenses involving possession of narcotics (127). A Committee of the District Court for the Southern District of New York notified counsel in March, 1975 that this case was reassigned to District Judge Lawrence W. Pierce (127, 148). Under these circumstances, appellant moved before Judge Pierce for an order pursuant to Rule 60(b), Federal Rules of Civil Procedure, to be relieved of the judgment of the former District Judge on the grounds of mistake and inadvertence of the Court in making its disposition and the surprise reasonably occasioned by the circumstances of that disposition. That motion is still pending in the District Court (128).

A vital ingredient of procedural due process under both the Fifth and Fourteenth Amendments is a hearing before an impartial tribunal. See Tumey v. Ohio, 1927, 273 U.S. 510.

In the Commentary to the standard on 'Circumstances requiring recusation,' ABA Standards, Function of the Trial Judge , supra, § 1.7, it is pointed out that

> "[T]here be a concerned interest in ascertaining whether the public impression will be favorable, even though the judge is convinced of his own impartiality. The question never centers on the reasonableness or fairness of the image which is being created, but rather on the actual character of that image. See Rosen v. Sugarman, 357 F.2d 794 (2d Cir. 1966)."

See also Orfield, Recusation of Federal Judges, 17 Buffalo L. Rev. 799 (1968); People v. Corelli, 1973, 41 A.D.2d 939, 343 N.Y.S.2d 555 (2d Dep't).

C O N C L U S I O N

The principal objection to the sanction of exclusion of evidence for violation of the Fourth Amendment is that the guilty may go free because of some question totally unrelated to the issue of guilt or innocence. "[T]he criminal is to go free because the constable has blundered.", in the words of Judge Cardozo [People v. Defore, 1926, 242 N.Y. 13 at 21]. In this case, the issue of guilt or innocence in a possessory offense is by no means collateral to the question of the warrantless and unlawful search and seizure. Moreover, the concurrent sentences of fifteen years to life imprisonment are Draconian in this case. In People v. Leonard, 1975, unreported, (Sup.Ct., Westchester Co.), upon a plea of guilty to 24 separate counts of felony murder for each of his victims, as well to single counts of arson and of burglary, an identical concurrent sentence was imposed in the same County. N.Y. Times, July 17, 1975, p. 33, col. 2-3.

The judgment of the District Court below dismissing the application for the Writ of Habeas Corpus without a hearing should be reversed in all respects.

Respectfully submitted,

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APPENDIX TO APPELLANT'S BRIEF

247 Harris Road
Bedford Hills, N.Y. 10507

July 29, 1975

Prof. Frederick Ludwig
444 West 56 Street
New York, N.Y.

Dear Mr. Ludwig:

Something is bothering me as well as my mother and we feel that you should be made fully aware of our concern. I don't believe, at this point, that it can be added as a separate point, but I would like for it to be included in one of the points that we have already made a part of the record. I feel that it will show that the police had full control of the apartment from January 29, 1971 until February 17, 1971 when I was eventually released from their custody.

January 24, 1971, the night of the arrest, the police arrived at 1:45 a.m. and remained until 3:45 a.m. when I was removed with them. They left officers in my apartment around the clock from January 24 until February 17th. The police had complete control of my apartment until that date, not even my mother was permitted to enter to get clothing for court or anything.

Now listen to this:

1. On Monday, January 25, 1971, I was arraigned and charged with Possession of 16 oz. of cocaine.

2. On Tuesday, January 26, 1971, I was bought back to Yonkers City Court and charged with Possession of 32 oz. of cocaine.

3. On Friday, January 29, 1971, there was a short hearing at which Det. S. Stypulkowski testified and I was charged with Possession of 54 oz. of cocaine.

My concern is the fact that they remained there and their testimony, somewhere should reflect that all the evidence was compiled on Sunday, January 24th. How is it that they were permitted to continue the increase in weight and why did this continue for four (4) days after my arrest? I feel this point should be fully explored.

At the hearing in the Yonkers City Court on Friday, Jan. 29, 1971, Stypulkowski testified and I believe the testimony will show that there are contradictions contained therein.

Should you feel that these suggestions warrant checking out, and I do, please come and see me so that I can give you all the necessary information. It is my opinion that this will help to support my contention about my prolonged detention. I cannot forgive myself for not bringing this to your attention sooner.

Hoping to see you soon.

In the struggle,

Deidra Smith

Deidra Smith

DS/li